

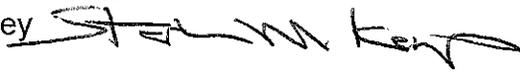


OFFICE OF THE CITY ATTORNEY
City of Peoria • 8401 West Monroe Street
Peoria, Arizona 85345

CIVIL
PROSECUTOR
FACSIMILE

623-773-7330
623-773-7335
623-773-7043

OPINION NO. 2014-01

TO: Katie Gregory, Deputy Finance Director
FROM: Stephen M. Kemp, City Attorney 
DATE: September 25, 2014
SUBJECT: Title 34 Public Buildings & Improvements

QUESTION: What is the application of Title 34, Arizona Revised Statutes pertaining to public works projects to Development Agreements, Impact Fee reimbursements and credits for projects constructed by private parties and ultimately dedicated to the City.

OPINION:

THE PURPOSE AND INTENT OF THE LAW

Having an understanding of the law may assist with the scenarios that appear unclear if Title 34 requirements must be followed. The law (i.e., Title 34, Public Buildings and Improvements) is intended to affect all contracts for construction of public buildings and structures, or alterations thereto. Secrist v. Diedrich, 6 Ariz. App. 102, 430 P.2d 448 (1967). All cities, counties, and towns are required to comply with Title 34 for design and construction services, which include building, repairing, improving or demolishing any public structure or building or other public improvements. (See, ARIZ.ATTY.GEN.OP. 183-016 (1983))

Prior to 1988, Arizona did not have a statute authorizing the entry of cities into Development Agreements. With the enactment of A.R.S. § 9-500.05, cities could enter into broad agreements with private parties for the construction of public owned infrastructure by the private party, with costs to be repaid or reimbursed by the city. The development agreement statutory authority did not address the application of the requirements of Title 34 to such projects.

The case that brought this matter to the forefront is Achen-Gardner, Inc. v. Superior Court in and for County of Maricopa, 173 Ariz. 48, 839 P.2d 1093 (1992). The case held that: (i) off-site, street related improvements are structures within the scope of competitive bidding laws, (ii) development agreements for off-site improvements are subject to public bidding requirements and (iii) a city is prohibited from reimbursing a developer for public street improvements unless it complied with the bidding law

requirements. In essence, Title 34 bidding requirements must be followed by private developers doing construction under a development agreement in which a city, county, or town is to repay a portion of the money with public funds.

The case goes on to state that development agreements between a city and a private developer for off-site improvements are subject to competitive bidding law for public projects, where improvements are on public property, and the city reimburses the developer under a development agreement for most or all of the cost of improvements from public funds. Development agreements however are defined by statute very liberally.

Factors to consider if the improvements are public projects, and not merely part of the private development, (i) are the improvements initially on public property and (ii) under an agreement (i.e., development) in which the City is to reimburse the developer for most or all of the cost of the improvements from public funds. Briefly, a municipality cannot alter the public nature of a project for the improvement of public property, to be paid in whole or in part by public funds, by entering into an agreement assigning a private party control over the bidding and letting of the construction contract. In response, to the decision of the Arizona Supreme Court, the legislature amended A.R.S. § 34-201 adding subsection G which provides:

G. A contribution by an agent for the financing of public infrastructure made pursuant to a development agreement is exempt from this section if such contribution for any single development does not exceed:

1. In fiscal year 1994-1995, one hundred thousand dollars.
2. In fiscal year 1995-1996 and each fiscal year thereafter, the amount provided in paragraph 1 of this subsection adjusted by the annual percentage change in the GDP price deflator as defined in section 41-563.

To the extent that projects fall within this statutory exemption, compliance with Title 34 is not required.

You have inquired about other scenarios where it may be unclear whether the requirements of Title 34 must be followed and specifically requested an opinion on the following scenarios:

1. Development projects, such as new subdivisions or commercial projects, in which there is no City financial involvement (i.e., zoning requirement to build a half street and then dedicate the street to the City).

Development projects described in scenario 1 would not trigger Title 34 requirements, as they are not receiving any public money, they are merely dedicating completed required items to the City in order to complete their project. The improvements (i.e., development projects, such as new subdivisions or commercial projects) generally are not on public property and only will become public property once

the improvements are completed and dedicated to the City and the City accepts them. Additionally, the City is not reimbursing the developer for the cost of improvements.

2. Residential or collector roadways and/or utilities that will be dedicated to the city upon completion?

Same analysis as above pertaining to scenario 1.

3. Development projects in which there is no City involvement but impact fee credits are available. Is there a difference if the developer chooses to receive impact fee OFFSETS vs. REIMBURSEMENTS? I would assume if the City is going to collect fees then reimburse it would trigger the Title 34 requirements; however, if the City just simply OFFSETS the transportation fees, is there still a Title 34 requirement for that item of infrastructure.

Yes, we have clearly established that reimbursements would trigger Title 34 requirements. The City has taken the position that there is no difference if the developer chooses to receive impact fee OFFSETS or REIMBURSEMENTS both are tantamount to public funds. This is consistent with the decision of the Arizona Court of Appeals in L.G. Lefler v. Tucson Airport Authority, 141 Ariz. 23, 684 P.2d 904 (App. 1984) (A not for profit corporation operating Tucson International Airport was held to be the City of Tucson operating through the entity subjecting all public works projects to Title 34).

If you should have any further questions please contact this office.